No. 88-1653

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

UNITED TRANSPORTATION UNION,
Cross-Petitioner

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,
Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the addition by an urban mass transportation authority of random drug and alcohol testing for safety-sensitive personnel to its existing fitness for duty testing program violates the Fourth Amendment where there is an established drug abuse problem among its employees and a compelling need to ensure the safety of the commuting public.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The proceedings below involved four actions which were not consolidated into one action. The parties to the proceedings below with their respective docket numbers are as follows:

The Cross-Petitioner is the United Transportation Union. The Cross-Petitioner was one of the Plaintiffs-Appellants-Cross-Appellees in Nos. 88-1163 and 88-1208.

The Cross-Respondents are Southeastern Pennsylvania Transportation Authority, Louis F. Gould, Jr., Esquire, Individually and in his official capacity as Chairman of the Board of SEPTA; Robert J. Thompson, Individually and in his official capacity as Vice Chairman of the Board of SEPTA; Brian W. Clymer; Judith E. Harris, Esquire; Mary C. Harris, Thomas M. Hayward, C.P.A.; Frank W. Jenkins, Esquire; Richard E. Kutz, Esquire; David W. Marston, Esquire; James C. McHugh and Franklin C. Wood, Individually and in their official capacities as Members of the Board of SEPTA. The Cross-Respondents were Defendants-Appellees-Cross-Appellants in all of the cases: Nos. 88-1160, 88-1161, 88-1162, 88-1163, 88-1206, 88-1207 and 88-1208.

Other parties to the proceedings below are:

1. Transport Workers' Union of Philadelphia, Local 234 in Nos. 88-1160 and 88-1206;

2. Transport Workers' Union of America, Local 2013 in No. 88-1161;

3. Brotherhood of Locomotive Engineers, Division 71 and Brotherhood of Locomotive Engineers and Thomas C. Brennan in Nos. 88-1162 and 88-1207; and

4. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Brotherhood of Maintenance of Way

Employees, Brotherhood of Railroad Signalmen in Nos. 88-1163 and 88-1208.

Cross-Respondent Southeastern Pennsylvania Transportation Authority has no parent corporation(s), non-wholly-owned subsidiaries or affiliates.

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

Cross-Respondents, Southeastern Pennsylvania Transportation Authority, et al. (SEPTA) respectfully request that this Court deny the cross-petition for a writ of certiorari seeking review of the Third Circuit's opinion in this case on the issue of random drug and alcohol testing. That opinion is reported at 863 F.2d 1110 (3d Cir. 1988) and is reproduced in the Appendix to the Cross-Petition (C-P) at A-1 to A-30.

STATEMENT OF THE CASE

The UTU has filed a Cross-Petition for a Writ of Certiorari on the question of the constitutionality of SEPTA's random drug and alcohol testing of operators and other safety-sensitive personnel. The case arises out of SEPTA's efforts to apply a long-standing and well publicized fitness for duty standard, and in support thereof to conduct random and return-to-work drug and alcohol testing of such personnel all as part of a balanced, tripartite program of education, rehabilitation and testing.

The UTU filed its Cross-Petition in response to SEPTA's Petition for a Writ of Certiorari filed on March 8, 1989 and docketed by this Court as No. 88-1486 (the Petition). The Petition addresses the major/minor dispute status under the Railway Labor Act of SEPTA's addition of random drug and alcohol testing to its existing fitness for duty drug and alcohol testing on its Regional Rail Division.[1] The Statement of the Case therein encompasses the facts pertinent to the Constitutional question as well, and, with the exception of Section G, is incorporated by reference herein.[2]

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1. On March 28, 1989, SEPTA filed a Motion to Withdraw In Part Petition for a Writ of Certiorari requesting the withdrawal of a second question regarding return-to-work testing which SEPTA presented in its Petition.

2. In addition, however, certain assertions contained in the UTU's statement of the case require correction. Rule 34.2, Supreme Court Rules. After noting that "[t]he trial court ordered SEPTA to prepare a revised program", C-P at 5, the UTU states that SEPTA's testing program was one that "continued to be revised, however, up to, during and after trial". C-P at 5. The UTU characterizes the revision process in a perjorative manner. Rather, that process was viewed by the District Court as a positive one: "*By repeated revision* of the original program, SEPTA has shown some willingness to accept recommendations and to accommodate other points of view." C-P at A-42 to A-43 (emphasis added).

The UTU also suggests that television reporters observed and television cameras recorded the act of urination by eleven SEPTA

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT IS CONSISTENT WITH THE HOLDINGS OF THIS COURT.

The Supreme Court decisions against which the Third Circuit's decision in this case must be measured are those in *Skinner v. Railway Labor Executives' Association,* 109 S.Ct. 1402 (1989) and *National Treasury Employees Union, et al v. Von Raab,* 109 S. Ct. 1384 (1989). The Third Circuit's decision in this case is in no way inconsistent with either of those subsequent decisions.

The essence of *Skinner* is that (1) the expectations of privacy of railway employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, which depends "in substantial part on the health and fitness of the . . . employees", 109 S.Ct. at 1418; (2) the governmental interest in testing employees who discharge "duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" is compelling, 109 S.Ct. at 1419; and (3) the Federal Railroad Administration "regulations supply an effective means of deterring employees engaged in safety sensitive tasks from using controlled substances or alcohol, in the first place" [*i.e.* before serious accidents occur]. 109 S.Ct. at 1419. Therefore, consistent with long standing principle, the Court reiterated in *Skinner* that a search warrant is not essential to render a particular search reasonable under the Fourth Amendment, and further, that in limited circumstances such as *Skinner* and *Von Raab*, where the privacy interests implicated by the

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employees on January 23, 1987 (prior to the District Court's injunction) at the outset of the then totally unrevised testing program. C-P at 4-5. There is not a shred of evidence in the record to support that suggestion which is simply untrue.

search are minimal and where an important governmental interest would be placed in jeopardy by a requirement of individualized suspicion, the search may be reasonable despite the absence of such suspicion. 109 S.Ct. at 1414-1421; 109 S.Ct. at 1390-1396. The Third Circuit's determination that random drug and alcohol testing of SEPTA's operators and other safety-sensitive employees is Constitutionally permissible squares precisely in all aspects with those elements of *Skinner*, and with *Von Raab,* which relied upon the reasoning of *Skinner.*

In *Skinner,* this Court upheld post-accident drug testing in the railroad industry where "[t]he problem of alcohol use . . . is as old as the industry itself", 109 S.Ct. at 1407; in *Von Raab*, it upheld suspicionless testing of Customs Service employees seeking promotion to jobs directly related to the interdiction of drugs or positions which require the carrying of firearms, even though the Service was "largely drug free", 109 S.Ct. at 1387. In each case, this Court took notice that drug abuse is widespread and poses a sufficient threat to the public safety or the nation's security so as to justify warrantless searches without individualized suspicion. *Skinner,* 109 S.Ct. at 1407, 1414-1416 and *Von Raab,* 109 S.Ct. at 1390-1393. In both *Skinner,* where the purpose is to "prevent accidents and casualties in railroad operations" and "ensur[e] the safety of the travelling public and of the employees themselves", 109 S.Ct. at 1415, and *Von Raab,* where the Customs Service's purpose is to ensure "safety and . . . the integrity of our borders," 109 S.Ct. at 1394, and " 'the operational realities of the workplace' may render entirely reasonable certain work-related intrusions", 109 S.Ct. at 1393, this Court found that the compelling governmental interests outweighed the individual employees' diminished expectation of privacy. 109 S.Ct. at 1418 and 109 S.Ct. at 1394.

Likewise, the Third Circuit established that SEPTA had "important public safety considerations in mind".

C-P at A-23.[3] The Third Circuit further noted:

> The safety justification for SEPTA's drug testing policy, SEPTA's documentation of drug use problem among its work force, the evidence of the deleterious effect of drug use, and SEPTA's showing of positive tests for drugs and alcohol by operating personnel at fault in accidents are sufficient bases for us to conclude that the random testing policy is constitutionally justified at its inception.

C-P at A-23. After establishing that there were these important public safety considerations at stake, the Third Circuit concluded that SEPTA's random testing

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3. The Third Circuit summarized the findings of the District Court as follows:

> The District Court made findings that drug use by SEPTA's operating employees presents a significant safety problem and that the Authority's prior suspicion-based testing program proved insufficient 'to satisfy the needs of the public safety' . . . There is adequate support for the district court's findings. SEPTA established that in six major accidents occurring in 1986 and 1987, collectively involving at least 89 injuries to persons, the operators of vehicles at fault tested positive for alcohol or drug metabolites. App. at 1017. The operator at fault in another accident refused to submit to a test. Further, of 262 employees tested "for cause" between January 1985 and July 1987, 82 employees (thirty-one percent) tested positive for drug metabolites or alcohol. App. at 1166. Twelve percent of the "new hires" given drug tests within the same period produced positive results (116 of 1,004 tested). App. at 1165. The Unions do not argue that these are statistically insignificant figures.

C-P at A-19 to A-20.

The statistical evidence documenting drug abuse and its relation to major accidents at SEPTA which was presented to the courts below, is of a greater magnitude than the evidence associated with the alcohol problem in *Skinner,* when one considers that the statistics in *Skinner* represented the entire railroad industry for periods of eight and eleven years. See *Skinner,* 109 S.Ct. at 1407-1408 and n. 1 and *Von Raab,* 109 S.Ct. at 1400 (Scalia, J. dissenting). The evidence in this case is also representative of a more recent time period than that described in *Skinner.*

program was constitutionally valid because there were sufficient safeguards such as confidentiality, chain of custody, verification, and scientific random selection procedures, to protect against abuse of official discretion in deciding whom and how to search; the testing policy was limited to employees whose job performance implicated public safety; and, finally, that there was a sufficient nexus between SEPTA's rationale for testing and the information gleaned through the use of urine tests. C-P at A-23 to A-24.

This Court in *Skinner* also concluded that the need for testing of safety-sensitive railway employees is compounded by the difficulty of detecting impairment:

> An idle locomotive, sitting in the roundhouse is harmless. It becomes lethal when operated negligently by persons under the influence of alcohol or drugs.' 839 F.2d at 593. . . .
>
> By contrast, the government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, see, e.g., *Rushton v. Nebraska Public Power District,* 844 F.2d 562, 566 (C.A. 8 1988); *Alverado Washington Public Power Supply System,* 111 Wash. 2d at 436, 759 P.2d at 433-434, employees who were subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others. An impaired employee, the agency found, will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.' 50 Fed. Reg. 31526 (1985).

> This view finds ample support in the railroad industry's experience with Rule G and, in the judgment of the courts that have examined analogous testing schemes.

109 S.Ct. at 1419.

> Similarly, the Third Circuit observed:
>
> . . . users are frequently able to mask their impairment so that it is not apparent. App. at 347. Also, SEPTA produced testimony establishing that use of drugs in itself results in significant impairment. There was testimony that long after all traces of drugs have left the system, there are significant delayed and chronic impairment effects.
>
> . . . In light of the evidence connecting impairment with drug use, it was appropriate for SEPTA to design its program in an effort to detect drug users. It was not required to limit its detection efforts to those employees whose then-current impairment could be detected, particularly in light of the testimony by experts offered by both the Unions and SEPTA that current urine testing technologies do not permit the detection or measurement of current impairment. *See* App. at 540, 548, 747, 780, 354-55.

C-P at A-20 to A-21.

The parallel between the concerns and reasoning of this Court in *Skinner* and *Von Raab* and the Third Circuit in this case emphasizes the consistency between the holdings of this Court and the Third Circuit decision.

The fact that neither *Skinner* nor *Von Raab* directly addressed random drug and alcohol testing does not render the Third Circuit's decision inconsistent with these opinions. For example, in *Skinner,* this Court was as concerned with the government's legitimate purpose in deterring drug and alcohol use through post-accident

testing as it was in determining which members of a train crew might have breached the regulations prohibiting drug use while in control of the railroad's equipment. 109 S.Ct. at 1419-1420. This Court noted:

> By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the time of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct . . . concomitantly increasing the likelihood that employees will forego using drugs or alcohol while subject to being called for duty.

109 S.Ct. at 1420. Similarly, under random testing, SEPTA's employees in operator and other safety-sensitive positions know they will be tested upon the occurrence of a computer generated, scientifically random selection of their name, the timing of which no SEPTA employee can predict with certainty. Thus, like the railway employees in *Skinner,* random testing will significantly increase the deterrent effect of the consequences associated with such prohibited conduct and will increase the likelihood that SEPTA's employees will forego using drugs or alcohol while on or subject to being called for duty. To that extent, as well, the Third Circuit decision is completely consistent with *Skinner* and *Von Raab.*

Moreover, notwithstanding the UTU's attempt to create the image of an Orwellian drama in which employees subject to random testing would be required to appear "at any time of the day or night and on or off duty (i.e. subject to call)", C-P at 13, and "[t]he employee, while subject to duty, may be called at home in the middle of the night and ordered to report for a blood and urine test", C-P at 12, the Court held in *Skinner*, that the railroad's interest in "ensuring the safety of the travelling public and of the employees themselves

plainly justifie[d] prohibiting covered employees from using alcohol or drugs on duty, *or while subject to being called for duty."* 109 S.Ct. at 1415 (emphasis added). Thus, the testing of employees subject to duty is not inconsistent with *Skinner*.

The UTU relies principally upon two cases long predating *Skinner* and *Von Raab* to support its contention that the Third Circuit decision conflicts with holdings of this Court. Both are readily distinguishable. *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978) involved the inspection of an ordinary business and thus fell well outside the "recognized exception" to the warrant and probable-cause requirement when "special needs" make that requirement "impracticable." 109 S.Ct. at 1414. There was in *Barlow's* no need comparable to "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety." *Id.* The Court distinguished *Barlow's* from cases involving businesses which "are indeed exceptions" to the search warrant requirement, such as those selling liquor and firearms. 436 U.S. at 313. See also *Donovan v. Dewey,* 452 U.S. 594, 601-602 (1981) (distinguishing *Barlow's* and noting its intended limitations.)

Similarly, there is no "direct conflict with this Court's decision in *Delaware v. Prouse,* 440 U.S. 648 (1979)". C-P at 12. As noted by this Court in *Skinner,* 109 S.Ct. at 1414, what is reasonable under the Fourth Amendment "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself". "Thus", this Court continued, quoting *Delaware v. Prouse,* 440 U.S. at 654, "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " 109 S.Ct. at 1414. In *Prouse,* this Court held that the random check of automobile drivers was not "a sufficiently productive mechanism to justify the intrusion". 440 U.S. at 659. The Court found in

Prouse that alternative mechanisms were available, *Id.*, unlike the situation in this case, where the Third Circuit concluded that:

> In light of the district court's finding that "[m]any drugs have delayed, residual or chronic effects not ascertainable through behavioral observation," 678 F.Supp. at 550, and that SEPTA's operating employees often work in circumstances which preclude close supervision, making it infeasible to monitor performance or detect signs of drug-induced impairment by direct observation, *the Unions have not shown that there is any less intrusive but equally effective means of detecting employee drug use.*

C-P at A-22 (emphasis added). Similarly, this Court in *Skinner* noted that the Federal Railroad Administration established the subject regulations because the prior industry efforts were not adequate to curb alcohol and drug abuse by railroad employees. 109 S.Ct. at 1407, 1419 n. 9.

In sum, the Third Circuit decision is entirely consistent with the holdings of this Court.

II. THERE IS NO CONFLICT IN THE CIRCUITS.

A. The UTU Misrepresents The Current Status Of The Law Since The Sixth Circuit Vacated Its Decisions In *Lovvorn* and *Penny*.

Contrary to the UTU's argument that this case presents the Court with "an appropriate vehicle to resolve the conflict between the circuits as to the constitutionality of random drug and alcohol testing," C-P at 14, there is no conflict between the circuits. Relying on two opinions, *Lovvorn v. City of Chattanooga,* 846 F.2d 1539 (6th Cir. 1988) and *Penny v. Kennedy,* 846 F.2d 1563 (6th Cir. 1988), the UTU claims that the Sixth Circuit has held that "mandatory urinalysis violates the

interests of public employees when it is carried out in the absence of reasonable individualized suspicion." C-P at 14 to 15.

On May 23, 1988, the Sixth Circuit did decide both *Lovvorn* and *Penny* holding that the mandatory urinalysis of firefighters and police officers on a department-wide basis without probable cause or suspicion was an unreasonable search and in violation of the Fourth Amendment. However, on August 3, 1988, the Sixth Circuit granted the appellants', City of Chattanooga and the Commissioner of Fire and Police of Chattanooga, petition for rehearing *en banc.* The Sixth Circuit ordered the previous decisions vacated, the mandates stayed and the cases restored to the docket as pending appeals. See *Lovvorn,* 861 F.2d 1388 (6th Cir. 1988) and *Penny,* 862 F.2d 567 (6th Cir. 1988). Additionally, the Sixth Circuit directed the parties to file supplemental briefs and noted that the clerk would schedule the cases for oral argument. The Sixth Circuit, sitting *en banc,* heard oral argument in both *Lovvorn* and *Penny* on December 7, 1988. To date, no decision has been rendered.[4] Thus, there is no conflict between or among the circuits.

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4. Even if the Sixth Circuit should decide that the drug testing programs in *Lovvorn* and *Penny* violate the Fourth Amendment, the UTU's argument that these decisions create a conflict between the circuits would be unconvincing. *Lovvorn* and *Penny* present cases that are distinguishable on the facts from the present one in that there was no evidence of drug use among the city firefighters or police officers. *Lovvorn,* 846 F.2d at 1547-1548 and *Penny,* 846 F.2d at 1567. This factual distinction was recognized by the Third Circuit in this case. See C-P at A-19 to A-20.

B. The Only Other Circuit Courts To Address The Issue Of Random Drug And Alcohol Testing Have Upheld Such Testing.

Although the UTU acknowledges that in addition to this case, the Third Circuit has upheld random drug testing in both *Shoemaker v. Handel,* 795 F.2d 1136 (3d Cir. 1986), *cert. denied,* 479 U.S. 986 (1986) and *Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington,* 850 F.2d 133 (3d Cir. 1988), *cert. denied,* 109 S.Ct. 1637 (1989) and that the Eighth Circuit has approved random testing of prison guards in *McDonell v. Hunter,* 809 F.2d 1302 (8th Cir. 1987), it ignores two other cases in which the Eighth Circuit also held that random testing was constitutional. See *Rushton v. Nebraska Public Power District,* 844 F.2d 562 (8th Cir. 1988) (random testing of nuclear power plant employees upheld) and *Spence v. Farrier,* 807 F.2d 753 (8th Cir. 1986) (random urinalysis testing of inmates to detect and deter the use of contraband drugs upheld).

The UTU also cites a Seventh Circuit case, *Div. 241, Amalgamated Transit Union v. Suscy,* 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976), characterizing it as "the first case" to consider the application of the Fourth Amendment to body fluid drug and alcohol testing of public transportation employees." C-P at 15. Although the UTU does not offer this case as one creating a conflict between the circuits, nevertheless, it cites it as if it has special legal significance. But the Seventh Circuit itself in its most recent opinion addressing and upholding random urinalysis testing of interscholastic athletes and cheerleaders makes no reference to *Suscy.* See *Schaill v. Tippecanoe County Corporation,* 864 F.2d 1309 (7th Cir. 1988).

In sum, the Third, Seventh and Eighth Circuits have found random testing to be valid under the Fourth Amendment while no circuit court has found it invalid. Therefore, no conflict exists.

CONCLUSION

For each of the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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